No. 02-1107

MAR 31 2003
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA ex rel. MARTIN BECKER,

Petitioner,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the court below properly ruled in accord with existing precedent that the government's knowledge and conduct are relevant to the requisite element of scienter under the False Claims Act (FCA)?

Whether the court below properly ruled in accord with existing opinions from other circuit courts of appeals that the government's knowledge and conduct can negate the requisite element of scienter under the FCA?

Whether the court below properly affirmed the summary judgment in this case based on Petitioner's failure to present evidence of the required elements of an FCA violation?

DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Westinghouse Savannah River Company respectfully submits the following disclosure statement:

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Westinghouse Savannah River Company, the managing and operating contractor for the United States Department of Energy, which owns Savannah River Site, is an affiliate of Westinghouse Government Services Company, L.L.C., a wholly owned subsidiary of Washington Group International, Inc.

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STATEMENT OF THE CASE

In the first sentence of his Statement of the Case, Petitioner Martin Becker erroneously suggests that his claim in this False Claims Act case has been consistent and well-defined since this dispute first arose. However, this suggestion ignores the history of the case, and a brief background on Becker's ever-evolving claim should assist the Court in understanding the issues.

Becker initially filed suit against Westinghouse Savannah River Company, LLC (WSRC) alleging that WSRC had underestimated the costs of certain building construction projects at the Department of Energy's Savannah River Site facility. When Becker learned that the projects were actually completed under budget, he dismissed this first claim and filed a second qui tam action alleging that WSRC had "wrongfully retained" approximately $12 million of the funds which were not used for the building construction projects. (App. 44.) In support of its motion for summary judgment on this claim, WSRC submitted uncontradicted evidence from DOE that all funds in excess of the building construction costs had been returned to DOE through a series of contract de-obligations. Further, the undisputed evidence showed that WSRC has no control over or responsibility for funds once they were de-obligated by DOE. (App. 51-53.)

As the district court recognized, Becker faced "insurmountable challenges" to his claims as a result of the uncontradicted evidence submitted by WSRC. (App. 53-54.) So, Becker attempted to "refine and reshape" his claim by asserting that even if all monies had been returned to DOE, DOE had improperly transferred certain of the returned building construction funds from

DOE accounts in the Office of Defense Programs (DP) to the Office of Environmental Management (EM). (Id.) While Becker admitted that WSRC could not be liable for the transfer itself, he asserted that WSRC had made some unspecified false statement or representation in connection with the alleged improper transfer because WSRC, at DOE's direction, changed the Budgeting and Reporting (B&R) codes contained in the joint DOE-WSRC accounting system to reflect the transfer. (App. 61-62.) Despite the fact that this claim was raised through an amended pleading after WSRC had moved for summary judgment, the district court allowed Becker to raise the claim but concluded that there was a total absence of evidence under any theory to support the elements an FCA claim. (App. 53–57, 63.) Therefore, the trial court granted summary judgment in favor of WSRC. (App. 63.)

On appeal, the United States Court of Appeals for the Fourth Circuit reviewed the trial court's findings and concluded that Becker's claim was without merit. The Fourth Circuit found that even if (1) DOE was uncertain about Congressional approval of the funds transfer; and (2) WSRC was aware of this uncertainty; and (3) WSRC received these transferred funds for purposes other than the building construction projects, WSRC could not be liable for any false statement in connection with the change in B&R codes because DOE had specifically directed WSRC to change the B&R codes and DOE, not WSRC, was the entity responsible for obtaining Congressional approval for the funds transfer.[1] (App. 7-

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[1] To the extent the Fourth Circuit actually concluded that the appropriations transfer was made without Congressional approval, that WSRC was aware of some question regarding the funds transfer, or that WSRC received transferred funds for projects other than the building construction projects, WSRC submits that such findings are unsupported by any evidence in the record.

12.) The Fourth Circuit, relying on cases from numerous other circuit courts of appeals, concluded that these undisputed facts negated the element of scienter required to establish a violation of the False Claims Act. (App. 12-14.)

REASONS FOR DENYING THE PETITION

A. This Court Should Deny The Petition Because The Decision Below Does Not Conflict With This Court's Precedent.

In an attempt to support his petition, Becker asserts that the opinion of the United States Court of Appeals for the Fourth Circuit in the present case "is squarely at odds" with the decision of the United States Supreme Court in Hughes Aircraft Co. v. United States ex. rel. Schumer, 520 U.S. 939 (1997). (Petition, 10.) Becker's assertion reveals a misunderstanding of both the Hughes opinion and the Fourth Circuit's opinion. As an initial matter, the holding of the Hughes case relates to the retroactive application of the 1986 amendments to the False Claims Act. This was not even an issue in the present case. Further, while it is true that this Court notes in the Hughes opinion that prior disclosure of the facts underlying an alleged false claim is no longer an absolute defense after the 1986 amendments to the FCA, the Fourth Circuit's opinion does not conflict with this holding because the Fourth Circuit did not suggest that prior disclosure of facts to the government is, by itself, a defense in this case. Instead, the Fourth Circuit held that the government's knowledge and actions related to an alleged false claim or statement are relevant to the issue of scienter and that the government's knowledge and actions can, in an appropriate case, negate the scienter required for an FCA violation. (App. 14.)

Based on this holding, the Fourth Circuit reviewed the undisputed facts in the present case regarding the government's knowledge and actions. Specifically, the Fourth Circuit recognized (1) that DOE, not WSRC, transferred $ 12 million dollars from DP to EM accounts[2]; (2) that DOE directed WSRC to change the reporting codes in the B&R system to reflect the transfer; and (3) that WSRC properly relied on DOE's statements that it had obtained approval from Congress for the transfer. (App. 8 - 9, 14.) The Fourth Circuit concluded that all of these facts taken together reveal that any alleged "implicit representation" made by WSRC through the B&R codes cannot possibly be considered a "knowing" false statement or false record under the FCA. (App. 14.) This conclusion does not conflict with the 1986 amendments to the FCA or the United States Supreme Court decision in Hughes.

B. This Court Should Deny The Petition Because No Conflict Exists Among the United States Circuit Courts of Appeals Regarding The Government Knowledge Defense.[3]

In his petition, Becker claims that the circuits are split on the issue of whether the government's knowledge of the falsity of a contractor's claim can bar an FCA action. (Petition, 10). Even a cursory reading

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[2] While the Fourth Circuit did not have to decide whether DOE's funds transfer was properly authorized, the transfer was permissible under 42 U.S.C. § 7269(b) which permits the transfer of unexpended balances of prior appropriations under the Energy and Water Development Act.

[3] Any assertion that the petition should be granted because some disagreement exists with regard to the application of equitable estoppel is without merit because the court below did not base any portion of its decision on the theory of equitable estoppel.

of the cases cited in Becker's petition reveal this assertion is without merit. There is uniform agreement in these decisions that the knowledge and action of the government can, in the appropriate case, provide a defense to an FCA action as the following quotes indicate:

> [T]here may still be occasions when the government's knowledge of or cooperation with a contractor's actions is so extensive that the contractor could not as a matter of law possess the requisite state of mind to be liable under the FCA. Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 519, 534 (10th Cir. 2000) (citations omitted).

> The fact that a contractor has fully disclosed all information to the government may show that the contractor has not 'knowingly' submitted a false claim, that is, that it did not act with 'deliberate ignorance' or 'reckless disregard for the truth'. United States ex rel. Kriendler v. United Technologies Corp, 985 F.2d 1148, 1157 (2nd Cir. 1993) (citations omitted).

> The government's prior knowledge of an allegedly false claim can vitiate a FCA action. United States ex rel. Durcholz v. FKW, Inc., 189 F.3d 542, 545 (7th Cir. 1999) (citations omitted).

> [T]he knowledge possessed by officials of the United States may be highly relevant. Such knowledge may show that the defendant did not submit its claims in deliberate ignorance or reckless disregard of the truth. United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) *appeal after remand* 81 F.3d 1465 (9th Cir. 1996).
>
> We agree with the Kriendler and Hagood courts that a defendant's knowledge that the government is aware of the falsity of the claim can, under certain circumstances, be relevant to *means rea*. United States v. Southland Mgmt. Corp., 288 F.3d 665, 686 (5th Cir. 2002), *rehearing, en banc, granted by* 307 F.3d 352.

Further, contrary to Petitioner's suggestion, nothing in the Fourth Circuit opinion suggests that the government's knowledge of an allegedly false claim automatically bars a qui tam action. On the contrary, the Fourth Circuit simply holds that the government's knowledge can negate the scienter requirement for an FCA violation in the appropriate case. (App. 14.) Based on the undisputed facts showing that the government not only knew of but also directed and ordered the alleged representation in the present case, the Fourth Circuit concluded that summary judgment was properly entered. (App. 15.) Reported decisions show that other circuits agree that this issue, in the proper case, is appropriate for decision as a matter of law. See Shaw, 213 F.3d at 534 (in appropriate case, government knowledge and cooperation can negate scienter as a matter of law); Durcholz, 189 F.3d at 545 (affirming summary judgment

in favor of defendant based on government knowledge); Hagood, 929 F.2d at 1421 (court may conclude at summary judgment stage that defendant is not liable based on government knowledge).

Therefore, no basis exists to claim that the United States Courts of Appeals disagree about the relevance or potential impact of the government's knowledge on the issue of scienter in an FCA case.

C. This Court Should Deny the Petition Because the Petitioner Has Never Presented Evidence of a Viable Claim under the Federal False Claims Act.

1. Lack of Falsity

It is well established that one of the most basic elements of any claim pursuant to the Federal False Claims Act is some false statement of fact or some false record. 31 U.S.C. § 3729(a). However, despite years of discovery, Becker has never identified any false statement or record made by WSRC in connection with the appropriations transfer. This is not surprising in light of the fact that the appropriations transfer theory asserted in response to WSRC's motion for summary judgment was based on alleged improper actions of DOE not on alleged improper actions of WSRC.[4]

Becker's only attempt to identify a false statement made by WSRC comes in the assertion that WSRC assigned new B&R accounting codes to the transferred funds. The initial problem with Becker's assertion is that the change in B&R codes was not and is not false. It

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[4] Becker has never cited any case law to support a finding of liability against WSRC based on the actions of DOE.

is undisputed that DOE transferred the funds from DP accounts to EM accounts. Once DOE completed this transfer, DOE directed WSRC to change the B&R codes to accurately reflect that the money had been transferred. Since the funds had been transferred, the new B&R codes assigned by WSRC were accurate and truthful.

Even assuming that the B&R codes contain some implicit representation by WSRC that the funds had been properly transferred, Becker failed to present any evidence that this representation was false because he never presented any evidence that the transfer was improper. At best, Becker has shown that Congressional authorization was required and that Congressional authorization *may not* have been obtained. (App. 56.) However, Becker, at trial and on appeal, has never shown any evidence that Congressional authorization was denied or was not obtained. Instead, Becker has relied on his expert's "idle speculation that all necessary approvals *might not* have been obtained." (App. 59.) This idle speculation is entitled to no weight because it resulted from "the expert's failure to review any documents manifesting the approval, and his failure to request copies of any such documents from DOE or Congress." (Id.) Further, the speculation of Becker's expert ignores all direct and circumstantial evidence that Congressional authorization was obtained.

First, Becker's expert failed to consider or explain why 42 U.S.C. § 7269(b), which specifically governs DOE appropriations transfers, did not authorize this funds transfer. Section 7269(b) provides as follows:

> The unexpended balances of prior appropriations provided for activities in this Act, or subsequent Energy and Water Development Appropriations Acts may hereafter be transferred to appropriation accounts for such activities established pursuant to this title. Balances so transferred may be merged with funds in the applicable established accounts and thereafter may be accounted for as one fund for the same time period as originally enacted.

Second, Becker's expert failed to adequately challenge the affidavit of DOE's Chief Financial Officer at the Savannah River Site which states that DOE had informed Congress about the appropriations transfer and that the transfer of funds occurred as a result of negotiations between Congress and DOE. (App. 59.) Third, Becker and his expert have never explained why Congress' recognition in the Conference Report for FY 1996 that there were more than $667 million in uncosted balances in the EM accounts does not reflect, at least, Congressional knowledge and approval of DOE's movement of large uncosted balances from the DP to the EM accounts. (Id.)

In light of the evidence supporting Congressional authorization of the funds transfer and the total absence of evidence indicating an actual denial or lack of Congressional authorization, Becker has not and cannot show a question of fact with respect to the authorization of the funds transfer. Therefore, he cannot show that any "implicit representation" or record regarding the transfer made by WSRC was false.

2. Lack of Knowledge or Deliberate Ignorance.

The False Claims Act imposes liability for "knowing" and material violations of the Act. A "knowing" violation occurs when a defendant has actual knowledge a statement was false, acted in deliberate ignorance of the truth or falsity of the statement, or acted with reckless disregard for the truth or falsity of the statement. 31 U.S.C. § 3729(b); United States ex. rel. Oliver v. The Parsons Co., 195 F.3d 457, 464 (9th Cir. 1999); Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) *appeal after remand* 81 F.3d 1465 (9th Cir. 1996). Innocent mistakes, negligent misrepresentations, oversights, or differences in opinion are not "knowing" false statements under the Act. Oliver, 195 F.3d at 464; Hagood, 929 F.2d at 1416. Further, a false statement which is based on a good faith, but incorrect, interpretation of a regulation cannot be considered a "knowing" false statement. Oliver, 195 F.3d at 464; Hagood, 929 F.2d at 1416. Simply put, the requisite intent is the knowing presentation of what is known to be false. Hagood v. Sonoma County Water Agency, 81 F.3d 1465 (9th Cir.) *cert. denied* 519 U.S. 865 (1996).

The only evidence presented by Becker to suggest that WSRC was aware of any question concerning Congressional authorization for DOE's transfer of funds are two DOE memoranda which allegedly contain questions about the funds transfer. (App. 60–63.) As an initial matter, these memoranda do nothing to prove WSRC had any knowledge concerning the impropriety of the transfer because this is a DOE, not a WSRC memorandum. These documents were authored and received by DOE employees, they do not mention WSRC,

and there is no indication WSRC received copies of the memoranda prior to the instigation of Becker's lawsuit. (Id.)

Further, even if WSRC received the memoranda, they do nothing to show WSRC's knowledge because the memoranda do not even suggest that there was anything improper or inappropriate about the funds transfer and they do not state or imply that Congress did not approve the transfer. Instead, the memoranda merely raise questions concerning the appropriate accounting and handling of the funds after the transfer. (App. 62.) The memoranda, at most, could create an awareness of some question about the funds, but this general awareness "falls far short of the 'known to be false' standard" required for liability under the False Claims Act. (Id.)

CONCLUSION

Based upon the foregoing, Respondent WSRC respectfully requests this Court to deny the Petition for Writ of Certiorari.

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